No. 80-1465

MAY 4 1981

ALEXANDER L. STEV
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

CROCKER NATIONAL BANK, a national banking association,
Petitioner,

vs.

STATE BOARD OF EQUALIZATION, an Agency of the State of California, an Agent of the Cities, Cities and Counties, and Counties of California, an Agent of the San Francisco Bay Area Rapid Transit District and an Agent of the Southern California Rapid Transit District, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Respondent State Board of Equalization's Brief in Opposition to Petition for Writ of Certiorari

GEORGE DEUKMEJIAN
Attorney General of the
State of California

TIMOTHY G. LADDISH
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-0792
Attorneys for Respondent
State Board of
Equalization

BORG PRINTING COMPANY OF CALIFORNIA, 348 FIRST STREET, SAN FRANCISCO 94105

QUESTION PRESENTED

Whether the District Court and the Court of Appeals have erred in holding that California's sales tax on sales to national banks during the period December 24, 1969, through December 31, 1972, was properly collected as a tax "imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof" within the meaning of subsection 3(b) of P.L. 91-156, 83 Stat. 434 (1969).*

---

*The United States of America, which does not appear in the caption, was a plaintiff with Crocker National Bank in the District Court for the Northern District of California and was an appellant with Crocker National Bank in the Court of Appeals for the Ninth Circuit. The United States has not petitioned this Court for a writ of certiorari in this matter.

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	2
Statutory and Constitutional Provisions	2
Statement of the Case	2
Summary of Argument	5
Argument	7
I. Introduction	7
II. This Court's *Diamond National* and *Chase Manhattan* Decisions Are Not Determinative of the Issue Now at Bar	8
III. California's Sales Taxes Automatically Applied to Sales to National Banks During the Temporary Amendment Period, for California's Bank Tax Was Not Designed to be "In Lieu" of Said Sales Taxes Under the Federal Standard Set in Subsection 3(b) of P.L. 91-156	10
A. In enacting subsection 3(b) Congress intended to permit the automatic imposition of a state's sales tax during the Temporary Amendment period if reference to that state's law disclosed that such imposition would not result in double taxation	10
B. The Court of Appeals correctly held that since California did not intend to impose its bank tax in lieu of the sales tax on sales to national banks, subsection 3(b) of P.L.	

TABLE OF CONTENTS

Page

91-156 permitted California's imposition of said sales taxes during the period at issue 13

1. Crocker's current position is based on an assumption which renders subsection 3(b) meaningless 13

2. The Court of Appeals' holding reflects the Congressional purpose of avoiding unintended double taxation and gives full effect to the "in lieu" standard contained in subsection 3(b) 15

Conclusion 18

Appendix A

Appendix B

TABLE OF AUTHORITIES CITED

Cases	Pages
Chase Manhattan Bank v. Finance Admin. (1979) 440 U.S. 447	5, 7, 8, 10, 17, 18
Diamond National Corporation v. State Board of Equalization (1976) 425 U.S. 268	4, 5, 6, 7, 8, 9, 16, 17, 18
Thomas v. Department of Motor Vehicles (1976) 59 Cal.App.3d 731, 131 Cal. Rptr. 164	16, 17
United States v. Kimbell Foods, Inc. (1979) 440 U.S. 715	6, 17, 18
United States v. State Bd. of Equalization (9th Cir. 1980) 639 F.2d 458 (subject of the current petition)	2, 11, 15, 16
Western Lithograph Co. v. State Board of Equalization (1938) 11 Cal.2d 156, 78 P.2d 731	15, 17
Xerox Corp. v. County of Orange (1977) 66 Cal.App. 3d 746, 136 Cal. Rptr. 583	16

Constitutional Provisions

United States:	
United States Constitution, Article VI, Clause 2	7
California:	
California Constitution, former Article XIII, Section 16	4

Table of Authorities Cited

Statutes

Pages

United States:

12 United States Code Section 548 ..... 2, 3, 5, 9, 13

P.L. 91-156, 83 Stat. 434 (1969) 2, 3, 4, 7, 10, 12

Section 3 ..... 3, 9, 11

Subsection 3(a) 4, 10, 14, 18

Subsection 3(b) 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

Subsection 3(b)(1) 5, 10, 14

Subsection 3(b)(2) 5, 14

Subsection 3(b)(3) 5, 10, 14

California:

California Revenue and Taxation Code

Section 23182 4

Section 23186 ..... 2, 16

Rules of the Supreme Court

Rule 22.2 8

No. 80-1465

In the Supreme Court of the United States

OCTOBER TERM, 1980

CROCKER NATIONAL BANK, a national banking association,
Petitioner,

vs.

STATE BOARD OF EQUALIZATION, an Agency of the State of California, an Agent of the Cities, Cities and Counties, and Counties of California, an Agent of the San Francisco Bay Area Rapid Transit District and an Agent of the Southern California Rapid Transit District, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Respondent State Board of Equalization's Brief in Opposition to Petition for Writ of Certiorari

---

OPINIONS BELOW

The opinions below are correctly referred to by petitioner Crocker National Bank (hereinafter referred to as "Crocker"). Since the submission of Crocker's petition to this Court, the opinion of the United States Court of Appeals for the Ninth Circuit has been reported as *United States v. State Bd. of Equalization* (9th Cir. 1980) 639 F.2d 458. Citations herein will be to the decisions as set forth in the appendices to the petition and as published in the reports.

STATUTORY AND CONSTITUTIONAL PROVISIONS

In addition to the federal and California provisions listed in Crocker's petition (Pet. 2) and set forth in the appendices thereto (Pet. App. D-H), reference is made herein to 12 United States Code section 548 as it read prior to its 1969 amendment (attached hereto as Appendix A) and to California Revenue and Taxation Code section 23186 (attached hereto as Appendix B) as it existed at the time of the 1969 enactment of P.L. 91-156.

STATEMENT OF THE CASE

This action was brought by the United States and by Crocker National Bank seeking a declaratory judgment that California could not legally impose its sales tax on sales to national banks during the period December 24, 1969, through December 31, 1972. In addition a refund was sought of amounts paid by Crocker to retailers with respect

to sales taxes imposed on sales of tangible personal property to Crocker during the above period. (R. 190-191.)[1]

The case was submitted to the District Court on cross motions for summary judgment on the pleadings. (R. 29-189.) On May 4, 1978, the District Court entered its Memorandum of Opinion holding in favor of the California State Board of Equalization (hereinafter referred to as the "Board") (R. 190) and on May 22, 1978, filed its order and judgment in favor of the Board (R. 207). On July 12, 1978, the United States and Crocker filed a timely notice of appeal. (R. 209.) The Court of Appeals for the Ninth Circuit affirmed the judgment in favor of the Board on October 23, 1980. Crocker filed its petition for a writ of certiorari on February 27, 1981. The time for the United States to file any such petition has expired without any such filing.

This case involves the Temporary Amendment of 12 U.S.C. § 548 by P.L. 91-156, 83 Stat. 434 (1969) (hereinafter "the Temporary Amendment"). The Temporary Amendment authorized the states to impose certain taxes, including sales taxes, upon national banks in addition to imposing one of the four forms of state taxation formerly authorized under section 548. The Temporary Amendment remained in effect from December 24, 1969, through December 31, 1972. (12 U.S.C. § 548 as it read prior to its 1969 amendment is set forth in Appendix A of this brief, and P.L. 91-156 is in Appendix D of Crocker's petition.)

Section 3 of P.L. 91-156 (set forth below at p. 9 n. 3) contained a Saving Provision which affected the operation

1. "R." refers to the pagination on the original record on appeal as repaginated by the Clerk of the District Court; Crocker has requested the transmittal of the record to this Court.

of the Temporary Amendment. Subsection 3(a) thereof barred the imposition of the taxes newly authorized under the Temporary Amendment unless affirmative state legislative action was taken after the P.L. 91-156 enactment. However, subsection 3(b), the construction of which is at issue in this case, exempted from the requirement of affirmative legislative action certain taxes, including sales taxes, imposed by a state which did not impose "a tax, or an increased rate of tax, in lieu thereof."

Since 1928, California has imposed a tax on national banks according to or measured by their net income (hereinafter "the California bank tax"). (R. 192.) At all times prior to the 1976 decision of this Court in *Diamond National Corporation v. State Board of Equalization* (1976) 425 U.S. 268, California regarded its sales tax as having its legal incidence for state and federal purposes on the seller rather than the purchaser. (R. 194-195.) This conclusion as to legal incidence of the California sales tax was made on the basis of many decades of consistent judicial and administrative construction to that effect. (R. 200.) Accordingly, the statement in the California bank tax law (former Cal. Const. art. XIII, § 16, (Pet. App. H) and Cal. Rev. & Tax. Code § 23182 (Pet. App. F)) that the bank tax was in lieu of all other taxes imposed upon the *banks* (other than real property taxes) was viewed as inapplicable to sales tax on sales *to* national banks; from the time the California sales tax was enacted it was collected from sellers by California upon sales to national banks.

During the period of the Temporary Amendment California continued to collect sales tax on sales to national banks, without any affirmative legislative action declaring that its sales tax was imposed on such sales. Because California regarded its sales tax to be on the vendor rather than the

vendee, the Board did not regard the California bank tax as being "in lieu" of the sales tax on sales to national banks (R. 202-203) and thus regarded the affirmative legislative action clause of the Temporary Amendment as being inapplicable.

In the 1976 *Diamond National* case, this Court, reversing the contrary holding of the California Court of Appeal, held that for purposes of federal immunity the legal incidence of the California sales tax was on the purchaser national bank. California has refunded the sales tax on sales to national banks for the period prior to the 1969 amendment of 12 U.S.C. § 548. However, since in the Board's view the California bank tax has never been imposed "in lieu" of the sales tax on sales to national banks, the Board has acted on the basis that the imposition of the California sales tax on sales to national banks was authorized during the period of the Temporary Amendment. Thus the Board has declined to make refunds for such period. Both the District Court and the Court of Appeals have confirmed the validity of the Board's position.

SUMMARY OF ARGUMENT

The issue in this case is quite narrow. The Board concurs with Crocker that under *Chase Manhattan Bank v. Finance Admin.* (1979) 440 U.S. 447 federal standards determine whether a state tax is one of the types (e.g., sales tax, tax on tangible personal property, etc.) of taxes listed in subsections 3(b)(1) through 3(b)(3) of the Saving Provision of P.L. 91-156. There is no doubt that we are dealing with a sales tax in this case.

The Board also concurs that a federal standard as to tax *incidence* determines whether this sales tax has been imposed upon a national bank. All of the taxes which Congress

authorized without affirmative legislative action in subsection 3(b) were taxes whose legal incidence under federal standards was on national banks. If this were not so, it would have been unnecessary for Congress to authorize their imposition. Under *Diamond National Corporation v. State Board of Equalization* (1976) 425 U.S. 268, it is clear that for the period involved in this case the California sales tax on sales to national banks was a tax whose incidence in this federal context was on the national banks.

The Board further concurs that the "in lieu thereof" provision in subsection 3(b) of the Saving Provision constituted a federal standard. However, contrary to Crocker's position, it does *not* necessarily follow that during the period of the Temporary Amendment this federal standard barred collection of California's sales tax when California's bank tax was not actually designed to be imposed in lieu of said sales tax. This is where the issue lies in this case.

This is simply a situation where a federal standard set by a federal statute involves a reference to state law to determine if that federal standard has been met. A *federal* rule can involve a reference to *state* law. *See United States v. Kimbell Foods, Inc.* (1979) 440 U.S. 715, 726-28. Since in the case at bar Congress intended to bar automatic imposition of sales taxes during the Temporary Amendment period only if such imposition would result in double taxation (see 639 F.2d at 464-65; Pet. App. A at A-12 through A-15), the *federal* standard set by the "in lieu thereof" provision in subsection 3(b) of the Saving Provision dictates reference to *state* law to find if the state's bank tax was actually designed to be in lieu of the sales taxes involved. As noted by the Court of Appeals (639 F.2d at 465, Pet. App. A at A-15 through A-17), there can be no real question that, when reference is made to California

law in applying this federal standard, the California bank tax was *not* meant to be imposed in lieu of the California sales tax on sales to national banks.

If, as is the fact, the California bank tax was not intended to be in lieu of sales taxes on sales to national banks, then it violates the letter and spirit of P.L. 91-156 to say that it was. The California legislative intent and judicial and administrative construction of the California bank tax for 40 years was that said bank tax was not imposed in lieu of the sales tax on sales to national banks; thus it was not a tax imposed in lieu of a sales tax on sales to national banks under the federal standard set by subsection 3(b) of P.L. 91-156. Accordingly, there was no danger that double taxation would result from the automatic imposition of the California sales tax during the Temporary Amendment period, and the California sales tax was validly applied to sales to national banks during that period. Nothing in the *Diamond National* or *Chase Manhattan* cases suggests a contrary conclusion.

ARGUMENT

I. Introduction.

No one can fault Crocker for lack of either persistence or bravado. Crocker and the United States of America were joined as plaintiffs below, and both lost in the United States District Court and the United States Court of Appeals. The United States then abandoned the fight by deciding not to file a petition for certiorari.[2] Undaunted, Crocker

2. It is ironic that as the United States withdraws from the case Crocker first invokes the Supremacy Clause (Pet. 2, App. G). Since every party which has been involved in this case has agreed that the provisions of a federal statute control the result of this case, it is not surprising that the United States saw no Supremacy Clause issue that would compel it to join Crocker in petitioning for a writ of certiorari.

continues alone. Not only does Crocker request the issuance of a writ of certiorari, it repeatedly suggests that this Court should grant certiorari *and* summarily reverse the decision of the Court of Appeals without further argument. Pet. 9, 21.

Perhaps Crocker's bold suggestion for summary reversal is based on a recognition that the more one considers Crocker's position the clearer its deficiencies appear. In any event, this brief in opposition to Crocker's petition was prepared under the admonition of this Court's rule 22.2, that it should be "as short as possible". Since the opinions of the District Court and the Court of Appeals are well written and are legally and logically sound, the Board defers to them for overall treatment of the issue presented in this case. At times this brief shall refer to portions of the Court of Appeals' opinion rather than using space and this Court's time in restating them. If for any reason this Court does find cause to grant certiorari, the Board hopes that it would have a chance to present a fuller discussion of the issues in a brief on the merits.

II. This Court's Diamond National and Chase Manhattan Decisions Are Not Determinative of the Issue Now at Bar.

Crocker argues that the Court of Appeals was somehow bound to reach the result urged by Crocker because of this Court's decisions in *Diamond National Corporation v. State Board of Equalization* (1976) 425 U.S. 268 and *Chase Manhattan Bank v. Finance Administration* (1979) 440 U.S. 447. Thus it becomes necessary to point out that the holdings of these two decisions are fully recognized by the Board and the Court of Appeals, and that neither of these decisions decided the issue in the case at bar.

Diamond National is a one-paragraph per curiam decision which holds that for federal purposes the incidence of

the California sales tax fell upon national banks as *purchasers;* under *Diamond National* the Board has refunded sales taxes it had collected as to sales to national banks for the period before the 1969 amendment to 12 U.S.C. section 548. The Board, the District Court and the Court of Appeals fully conform to that 1976 holding and further recognize that during the period of the Temporary Amendment (after the 1969 amendment to 12 U.S.C. § 548) the incidence of the California sales tax continued for federal purposes to be upon the national banks as purchasers. *Diamond National* did *not* involve any issue under subsection 3(b) of the 1969 legislation (P.L. 91-156). For the reasons discussed below at pages 13-15, 17, the *Diamond National* holding regarding federal incidence is *not* determinative of the subsection 3(b) "in lieu" issue that is the sole issue in this case.[3]

The *Chase Manhattan* case also did not involve the subsection 3(b) "in lieu" issue. Crocker acknowledges (Pet. 14) that in *Chase Manhattan* neither the New York court nor this Court even discussed the application of the "in

---

3. Section 3 of P.L. 91-156 (which became effective with the Temporary Amendment on December 24, 1969) provided in part as follows:

"§3. Saving provision

(a) Except as provided in subsection (b) of this section, prior to January 1, 1972 [later amended to "January 1, 1973" by P.L. 93-213], no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless

(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act.

(b) The prohibition of subsection (a) of this section does not apply to

(1) any sales tax or use tax complementary thereto,

. . .

imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof."

lieu" proviso clause of subsection 3(b). This Court's holdings in *Chase Manhattan* were that New York had not taken sufficiently affirmative action to qualify its tax for imposition under the terms of subsection 3(a) and that the New York tax under consideration was not a "tax on tangible personal property" under the federal standard set by subsection 3(b)(3). In the present case there is no claim that California took affirmative action under subsection 3(a), and all parties are in agreement that the California tax now in issue was a "sales tax" under the federal standard set by subsection 3(b)(1).

Contrary to Crocker's contentions (Pet. 8, 15) the *Chase Manhattan* decision did not hold that P.L. 91-156 must be strictly construed, nor did it hold that state law could not be referred to in applying the "in lieu" provisions at the end of subsection 3(b). The Board recognizes that those "in lieu" provisions constitute a federal standard; as shown below at pages 10-12, 15, 17-18, that federal standard contemplates a reference to state law in carrying out Congress' intent of avoiding automatic double taxation. The *Chase Manhattan* decision is fully consistent with Congress' intent that the Saving Provision would avoid automatic double taxation while it allowed new taxes to be imposed upon national banks during the period of the Temporary Amendment.

III. California's Sales Taxes Automatically Applied to Sales to National Banks During the Temporary Amendment Period, for California's Bank Tax Was Not Designed to Be "in Lieu" of Said Sales Taxes Under the Federal Standard Set in Subsection 3(b) of P.L. 91-156.

A. IN ENACTING SUBSECTION 3(b) CONGRESS INTENDED TO PERMIT THE AUTOMATIC IMPOSITION OF A STATE'S SALES TAX DURING THE TEMPORARY AMENDMENT PERIOD IF REFERENCE TO THAT STATE'S LAW DISCLOSED THAT SUCH IMPOSITION WOULD NOT RESULT IN DOUBLE TAXATION.

The Court of Appeals' opinion provides a succinct and accurate analysis of Congressional intent as disclosed by

the actual language of subsection 3(b) and by the legislative history of its enactment. 639 F.2d at 463-65, Pet. App. A at A-11 through A-15. The Board will not now repeat the legislative history which has been summarized by the Court of Appeals.

It is clear from the Court of Appeals' references to the legislative record that Congress in enacting section 3 was concerned with the prospect of unintended automatic double taxation. 639 F.2d at 464, Pet. App. A at A-13 through A-14. In this context "double taxation" would occur if the Temporary Amendment resulted in the automatic imposition of a state's sales tax upon national banks when potential revenues from that tax had already been considered in the process of imposing that state's pre-1969 bank tax. *Id.* As noted by the Court of Appeals, the legislative record clearly demonstrates that the individual state's laws would be considered in determining whether automatic imposition of the state's sales tax would be permitted by subsection 3(b). 639 F.2d at 465, Pet. App. A at A-14 through A-15 (remarks of Senator Proxmire, floor manager of the bill). Thus Congress intended that automatic double taxation would be avoided under subsection 3(b) by referring to the state's laws to determine whether the bank tax was actually imposed in lieu of the sales tax, i.e., whether the potential revenues of the sales tax had been considered in the process of imposing the bank tax.

Subsection 3(b) was added in the conference committee; the only published legislative materials specifically pertaining to subsection 3(b) as added are the remarks of Senator Proxmire, which are quoted in part by the Court of Appeals and which fully support that Court's approach. Crocker ignores Senator Proxmire's statement completely; in noting that Congress generally was retaining some federal limitations on state action (Pet. 18-20) Crocker refuses to recog-

nize that the *federal* "in lieu" limitation written into subsection 3(b) contemplated a reference to *state* laws. Also see below at pages 17-18.

Crocker presents nothing from the legislative record which would indicate that, at the time subsection 3(b) was added, the conference committee made any reference to the American Bankers Association's earlier proposal, which is quoted on pages 19 and 20 of Crocker's petition. Even if the very similar A.B.A. "in lieu" language did serve as a model for subsection 3(b), Senator Proxmire's remarks (which specifically pertained to subsection 3(b) as added by the conference committee) support the Court of Appeals' interpretation. Furthermore, although the A.B.A. comments (made months before subsection 3(b) was added) which Crocker quotes on page 20 of the petition show an apparent ignorance of what taxes California was collecting,[4] they indicate a concern about automatic double taxation which is fully consistent with the holding of the Court of Appeals.

---

4. It is interesting that Crocker chooses to end its petition with a quoted comment from an October 1969 letter from the A.B.A. which demonstrates an apparent misunderstanding of California law. That letter states in part that "In a number of states, California for example, an increased rate of tax over and above the tax rate applicable to corporations generally is imposed on banks in lieu of sales, personal property and motor vehicle taxes." The letter goes on to say that it would be unfair to impose those special taxes under the new authority, and at the same time to continue the extra tax or built-up rate of tax. See Pet. at 20. To make any sense at all, the reference to the California bank tax being in lieu of the sales tax must have referred to the exemption enjoyed by California banks on *their* sales of tangible personal property to others, for it is very clear that at the time of the hearings resulting in P.L. 91-156 the California sales tax was being collected on sales *to* national banks. To the extent this letter meant to refer to California sales taxes on sales to national banks, it is clearly wrong. The District Court correctly concluded that such statements "reflect a superficial understanding of California law and should be given no weight in determining the intent of Congress." 450 F. Supp. at 1037 n. 7, Pet. App. B at A-32—A-33 n. 7.

B. THE COURT OF APPEALS CORRECTLY HELD THAT SINCE CALIFORNIA DID NOT INTEND TO IMPOSE ITS BANK TAX IN LIEU OF THE SALES TAX ON SALES TO NATIONAL BANKS, SUBSECTION 3(b) OF P.L. 91-156 PERMITTED CALIFORNIA'S IMPOSITION OF SAID SALES TAXES DURING THE PERIOD AT ISSUE.

1. Crocker's Current Position Is Based on an Assumption Which Renders Subsection 3(b) Meaningless.

Crocker's current argument is based upon Crocker's assumption (Pet. 17) that the *resolution* of this case's "in lieu" issue under subsection 3(b) of the Saving Provision depends on whether the incidence (for federal purposes) of the California sales tax was on the national banks as consumers during the years involved. Crocker's assumption is patently erroneous—if the incidence of the sales tax for federal purposes had *not* been on the banks, *none* of the restrictions of 12 U.S.C. section 548 or the Temporary Amendment thereto would have applied to restrict collection of the sales tax, and there would be absolutely no need to even consult subsection 3(b) in order to justify the collection of the sales taxes. Stated another way, the incidence of the sales tax for federal purposes must have been on the national banks before any issue could even *arise* under the "in lieu" provision of subsection 3(b).

Crocker's own petition demonstrates how its present basic assumption renders meaningless all of subsection 3(b). On page 10 Crocker makes the following correct statement:

> "First, it is important to note that the sales tax referred to in Subsection 3(b)(1) is a sales tax imposed upon the banks as consumers. Both courts below acknowledged this fact. Indeed this must be the case because Congress was permitting the states to impose a sales tax upon national banks; if the sales tax was in fact imposed upon the vendor it could have been imposed in any event."

So the first necessary step in applying subsection 3(b) (to authorize the imposition of a sales tax during the

Temporary Amendment bridge period without affirmative state legislative action) is a determination under subsection 3(b)(1) that the sales tax had its incidence for federal purposes upon the national banks. Once this step is achieved, one moves on to the second step, a determination under the "in lieu" provision at the end of subsection 3(b). As noted above, on page 17 of its petition Crocker makes its basic assumption that the outcome of the "in lieu" test is *also* determined by "whether or not the incidence of the sales tax is upon the banks." Pet. 17. Thus under Crocker's current approach the incidence upon the banks for federal purposes which is necessary to *qualify* a sales tax as being within subsection 3(b)(1) would necessarily *disqualify* it under the "in lieu" language at the end of subsection 3(b). Under this approach there would be no reason for the list of specific types of taxes in subsections 3(b)(1) through 3(b)(3), for *any* tax whose incidence was on the national banks (and that was not authorized before the 1969 legislation) would be barred unless affirmative legislative action were taken under subsection 3(a), and any tax whose incidence was *not* on the national banks would continue to be unaffected by the federal bank tax legislation. In short, Crocker's current approach would render subsection 3(b) totally ineffective and meaningless.

Given the demonstrated error of the current position which Crocker states in its petition for certiorari, Crocker might now retreat to the position presented in the Court of Appeals, that subsection 3(b) should be interpreted as permitting the automatic imposition of a sales tax during the Temporary Amendment bridge period *only* where a state does not impose *any* form of "in lieu" tax. As stated by the Court of Appeals:

> "We agree with the district court that this strained interpretation deprives much of the language of § 3(b)

> of any significance. If Congress had intended this meaning, it need not have included the words 'in lieu thereof' in § 3(b). Nor would any reference to 'an increased rate of tax' be necessary if § 3(b) could apply only where no tax at all was imposed." 639 F.2d at 463-64; Pet. App. A at A-12.

2. The Court of Appeals' Holding Reflects the Congressional Purpose of Avoiding Unintended Double Taxation and Gives Full Effect to the "In Lieu" Standard Contained in Subsection 3(b).

The Court of Appeals held that the federal standard enacted by Congress in the "in lieu" provisions of subsection 3(b) was not dependent upon federal incidence, but that said standard contemplated a consideration of the state laws involved to determine whether the state's bank tax was in fact intended by the state legislature to be imposed in lieu of the sales tax on sales to national banks. 639 F.2d at 462-464, 465; Pet. App. A at A-8 through A-11, A-15. The Court of Appeals correctly noted that, beginning with *Western Lithograph Co. v. State Board of Equalization* (1938) 11 Cal.2d 156, 78 P.2d 731, and continuing through the period of the Temporary Amendment here at issue, California law clearly contemplated that the California bank tax was not imposed "in lieu of" the California sales tax on national banks. 639 F.2d at 465; Pet. App. A at A-16 through A-17. This understanding was based on the clear fact that under California law the sales tax was a tax on the seller, not the buyer. Crocker is not now contesting this legislative fact (Pet. 5 n. 2).[5] Thus through the bridge period California was acting pursuant to California law in imposing and collecting both the bank tax and the sales

---

5. Thus there is no basis for Crocker's implication (Pet. 13) that during the period at issue the California Legislature might have intended its sales tax to be imposed upon the national banks "as consumers". Crocker recognizes (Pet. 11) that because of *Western Lithograph* California clearly thought that it could collect sales tax on sales to national banks during the period involved here.

tax on sales to national banks, and there obviously was no contemplation that the built-up tax rate for the bank tax was in any way compensating for lost sales taxes on sales to national banks.[6] In short, as held by the Court of Appeals, there was no danger of unintended double taxation in allowing the sales tax on sales to national banks to be collected during the bridge period, and the California bank tax was not imposed "in lieu" of the sales tax on sales to national banks. 639 F.2d at 465, Pet. App. A at A-17.[7]

---

6. See appendix B for California Revenue and Taxation Code section 23186, which directed how the bank tax rate was to be calculated. As recognized by the Court of Appeals (639 F.2d at 465, Pet. App. A at A-16), even after *Diamond National* determined in 1976 that for federal purposes the incidence of the California sales tax was on the buyer, for purposes of California law the incidence remained upon the seller. *Xerox Corp. v. County of Orange* (1977) 66 Cal.App.3d 746, 136 Cal. Rptr. 583. Thus even after the *Diamond National* decision California by its own law could not collect sales tax on sales *by* national banks. Crocker's interpretation of the Saving Provision would result in a windfall to the banks for the Temporary Amendment period insofar as they would enjoy an unintended immunity from any sales tax reimbursement obligations incurred as a result of sales made *to* them while at the same time remaining exempt under California law from sales taxation on sales made *by* them. In all of this it must be kept in mind that the *Diamond National* decision, which gave rise to this dichotomy of federal/state incidences of the California sales tax, was not decided until 1976, years after the Temporary Amendment period had ended.

7. *Thomas v. Department of Motor Vehicles* (1976) 59 Cal. App.3d 731, 131 Cal. Rptr. 164, relied upon by Crocker (Pet. 13, 16), is clearly distinguishable from the case at bar. *Thomas* involved a California motor vehicle license and registration tax which by its terms would apply generally but which California had always recognized was inapplicable to national banks because of the "in lieu" provisions of the California bank tax law. Thus the bank tax rate was established and maintained with the knowledge that the bank tax was indeed in lieu of that motor vehicle tax, even though the bank tax rate formula did not include specific figures that were estimates of what California's receipts would have been if the motor vehicle tax had been imposed on national banks. In *Thomas* the Court held, consistent with the State of California's argument therein, that California's bank tax was imposed in lieu of said motor vehicle tax for purposes of subsection 3(b). Auto-

The Court of Appeals' reference to *Western Lithograph, supra,* is fully consistent with this Court's *Diamond National* decision. In this case *Western Lithograph* serves only as a reference point in order to determine whether California intended its bank tax to be imposed in lieu of the sales tax on sales to national banks. In this case neither the Board nor the Court of Appeals is looking to *Western Lithograph* to establish that the incidence of the pre-1979 California sales tax was on the seller for purposes of *federal* rather than California law. That issue was decided by this Court in *Diamond National,* and the *Diamond National* decision merely gave rise to the distinct issue now at bar.

The Court of Appeals' reference to California law is fully consistent with this Court's decision in *Chase Manhattan Bank v. Finance Administration* (1979) 440 U.S. 447. In contrast, the last argument in Crocker's petition (Pet. 16-20) is directly inconsistent with this Court's decision in *United States v. Kimbell Foods, Inc.* (1979) 440 U.S. 715, decided by this Court within one month after the *Chase Manhattan* decision. Crocker argues that the Court of Appeals' interpretation removes the proviso clause of subsection 3(b) "as a federal limitation", in a manner allegedly contrary to the *Chase Manhattan* decision; Crocker assumes as a basis for this argument that a federal standard cannot involve a reference to state law.

---

matic imposition of that motor vehicle tax during the bridge period of the Temporary Amendment would have resulted in the sort of double taxation Congress meant to avoid by enacting the "in lieu" language at the end of subsection 3(b). Thus, contrary to Crocker's argument (Pet. 17) and in contrast to the lack of effect Crocker's current approach would give to subsection 3(b) (see above at pages 13-15), the different but consistent results as between *Thomas* and this case demonstrate that the Court of Appeals' interpretation gives substantive effect to the language of subsection 3(b).

The Board readily concurs that the "in lieu" clause of subsection 3(b) constitutes a federal standard. However, as shown above and in the Court of Appeals' decision, this federal standard contemplates a reference to state law in order to determine whether the state bank tax was actually intended to be imposed "in lieu of" the sales tax; if so, Congress directed that unintended double taxation would be avoided by requiring affirmative legislative action under subsection 3(a); if not, there was no danger of unintended double taxation of the nature feared by Congress, and the sales tax could be automatically imposed because of subsection 3(b). This Court in *United States v. Kimbell Foods, Inc.* (1979) 440 U.S. 715, 726-28 makes it quite clear that a *federal* rule can involve a reference to *state* law. In taking this approach the Court of Appeals satisfies the Congressional intent, gives full effect to each part of subsection 3(b), and does not violate any principle or holding of this Court's *Diamond National* or *Chase Manhattan* decisions.

CONCLUSION

For the reasons given above and in the opinion of the Court of Appeals, it is respectfully submitted that Crocker's petition for a writ of certiorari should be denied.

DATED: May 1, 1981

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General of the
State of California

TIMOTHY G. LADDISH
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-0792

Attorneys for Respondent
State Board of
Equalization

Appendix A

12 U.S.C. § 548, As In Effect Prior to December 24, 1969.

§ 548. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subsection (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in the competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In the case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however,* that a State which imposes a tax on or according to or measured by the net income of, or a fran-

chise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. R.S. § 5219; Mar. 4, 1923 c. 267, 42 Stat. 1499; Mar. 25, 1926 c. 88, 44 Stat. 223.

Appendix B

California Revenue and Taxation Code Section 23186, As In Effect Prior to December 24, 1969.

§ 23186. The rate of tax on banks and financial corporations shall be a percentage equal to the percentage of the total amount of net income, allocable to this state, of every corporation taxable under Section 23151, other than public utilities as defined in the Public Utilities Act, for the next preceding calendar year or fiscal years ended during such calendar year, required to be paid to this state as franchise taxes according to or measured by such net income, and required to be paid to this state or its political subdivisions by such corporations as personal property taxes during the preceding calendar year or fiscal years ended in such calendar year; provided, however, that said rate of tax shall not exceed 11 percent. The percentage of the net income of every corporation taxable under Section 23151, other than public utilities as defined in the Public Utilities Act, required to be paid to this state or its political subdivisions in personal property taxes shall be determined by ascertaining the ratio which the total amount of such personal property taxes, less 7 percent thereof, bears to the total amount of net income of such corporations allocable to California, increased by the amount of such personal property taxes; provided, however, that if any such corporation sustains a net loss allocable to California the personal property taxes required to be paid by such corporation to this state or its political subdivisions during the preceding calendar year or fiscal years ended during such calendar year shall be considered for the purpose of determining such ratio only to the extent which such personal property taxes exceed such net loss allocable to California.